

II. Argument

The findings of fact and conclusions of law made by a court in deciding a preliminary injunction motion are not binding at the trial on the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 649 (10th Cir. 1992), *overruled on other grounds*, *Systemcare, Inc. v. Wang Labs Corp.*, 117 F.3d 1137 (10th Cir. 1997) (recognizing that "the district court is not bound by its prior factual findings determined in a preliminary injunction hearing"). This is because, in part, preliminary injunction proceedings are resolved "on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *See Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) (citation omitted) (noting that Tenth Circuit was "not address[ing] the underlying merits of Oklahoma's ultimate claims at trial"). Indeed, the State's preliminary injunction case was litigated, without limitation, (1) under tight time constraints, (2) without the State being afforded discovery of Defendants' experts, (3) with scientific evidence that was still being collected, (4) without merits discovery having been completed, and (5) with respect to a narrow portion of the State's overall case. Since the preliminary injunction, the State has, without limitation, had the opportunity to (1) conduct discovery of Defendants' experts, (2) collect additional scientific evidence, (3) complete merits discovery, (4) have its retained experts submit reports, and (5) identify a myriad of non-retained experts who have concluded that poultry waste is polluting the waters of the IRW.

Underscoring the inapplicability of preliminary injunction determinations to a trial on the merits is the fact that evidence in a preliminary injunction proceeding is evaluated under a different standard and for a different purpose. As this Court explained in its ruling on the motion for preliminary injunction, "[b]ecause the preliminary injunction requested by the State falls

within two of the disfavored categories identified by the Tenth Circuit, the State must meet the heightened standard." *See* DKT #1765 at 5-6 (Sept. 29, 2008 Opinion and Order) (emphasis added); *see also id.* at 4 (noting that "[a] party seeking such an injunction must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms") (citations omitted) (emphasis added).

The denial of the State's motion for preliminary injunction or any factual findings made therein thus is irrelevant, would confuse the issues and would unfairly prejudice the State. As such, such evidence should be excluded. *See* Fed. R. Evid. 401, 402 & 403; *see also Hauck Manufacturing Co. v. Astec Industries, Inc.*, 2004 U.S. Dist. LEXIS 30831, *2 (E.D. Tenn. Nov. 3, 2004) ("The preliminary injunction is not a conclusive determination of the issues in this case and is in no way binding upon the jury in their deliberations. Therefore, any mention of the fact of the preliminary injunction or the Court's findings and reasoning in support of the injunction generally is not relevant to issue in the case and presents a danger of prejudice to Defendants").

III. Conclusion

The State's motion for an order precluding Defendants from making reference to the fact that the State's Motion for Preliminary Injunction was denied or to any factual findings made therein should be granted.

Respectfully Submitted,

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